

broadcasters air an hour of educational programming -- or more-- each day.⁵⁴ More than a third of all persons surveyed (35%) would require two hours daily.⁵⁵ Commenters urge the Commission to do what is in the best interest of the public and of children, and adopt a quantitative standard for core programming of one hour per day.

A. Educational Programming Provides Children With Important Learning Opportunities and An Alternative to Sexually Explicit and Violent Programming

Both Congress and the FCC have conclusively found that television provides great learning opportunities for children.⁵⁶ In the findings of fact to the CTA, Congress emphasized that "[i]t has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior."⁵⁷ Similarly, in the recent Notice, the FCC cited both studies and surveys in support of the proposition that "television can effectively teach children"⁵⁸ and that watching educational shows specifically designed for children enhances their attentional and perceptual skills and helps prepare them for formal schooling.⁵⁹

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Notice at ¶ 1.

⁵⁷ See Children's Television Act of 1990, Title I, Sec. 101(1).

⁵⁸ Notice at ¶ 10.

⁵⁹ Id.

In addition to the studies relied on by the FCC, more recent studies have demonstrated that early viewing of educational programming is directly linked to increased learning.⁶⁰ The Wright & Huston study found that early educational viewing by lower income children, ages two to four, contributed to their school readiness and increased their performance on tests of reading, math, and vocabulary as much as three years later.⁶¹

Wright & Huston further found that children, ages six to seven, who regularly watched children's informative programs performed better on tests of reading comprehension and in-school adjustment than other children.⁶² The Wright & Huston study also found that children who watched informative children's shows such as Sesame Street, spent less time watching cartoons and adult programs than other children, and more time reading and engaged in educational activities.⁶³ Finally, Wright & Huston's

⁶⁰ John C. Wright & Aletha C. Huston, Effects of Educational TV Viewing of Lower Income Preschoolers on Academic Skills, School Readiness, and School Adjustment One to Three Years Later, (May 1995) ["Wright & Huston"]; See also J.L. Singer, Ph.D. and D.G. Singer, Ed.D., Barney & Friends as Education and Entertainment, at 21, 31 (Feb. 25, 1994) ["Singer & Singer"]. The Singer & Singer study found that children who watched Barney showed greater counting skills, knowledge of colors and shapes, vocabulary, and social skills than children who did not. The study found that the children's reactions to Barney suggest that the show works on "interactive response which psychological learning theory indicates is conducive to effective encoding and retention of new material." Id. at 44.

⁶¹ Wright & Huston at 21.

⁶² Id. at 21.

⁶³ Id. at 14, 16.

study found that children who spent a lot of time watching cartoons and adult programming spent less time in educational activities and reading.⁶⁴

Other studies have documented the detrimental effects on children of viewing programming filled with violence.⁶⁵ One study found some viewers become desensitized to violence in the media, believing it is an acceptable response to a problem.⁶⁶ There is also a current outcry against shows filled with sexually explicit content as well. Despite these concerns, during the afternoon hours, when 28% of all children are home and watching television,⁶⁷ talk shows with adult themes are children's primary viewing option. During a random week in May 1993, commercial stations offered programs including the following:

⁶⁴ Id. at 16.

⁶⁵ The UCLA Television Violence Monitoring Report, UCLA Center for Communication Policy, at 2-12 (Sept. 1995) ["1995 UCLA Report"] citing Monroe Lefkowitz, Television Violence and Child Aggression: A Follow-up Study, (finding that the more violence an 8 year old boy watched the more aggressive his behavior at both 8 and 18); J.L. and D.G. Singer, Television Imagination and Aggression: A Study of Preschooler's Play, (1980) (finding that children's viewing habits at home were related to their behavior during free-play periods at day-care); E.D. McCarthy, Violence and Behavior Disorders, (1975) (finding that watching television violence is related to fights with peers, conflict with parents and delinquency).

The Singer study found that children who watched Barney were less aggressive toward their classmates, spent less time in the "time out" corner and more time in productive work and play. Bruce Fellman, Taking the Measure of Children's TV, Yale Alumni Mag., Apr. 1995, at 50.

⁶⁶ See Pediatrics: American Academy of Pediatrics, Children, Adolescents, and Television, Vol. 96, No. 4 at 786 (Oct. 1995).

⁶⁷ Minow & Lamay at 37.

Oprah: A couple accused of killing their children;; Sally: A 10-year-old girl with a 38C bust; The Montel Williams Show: Parents who take their kids to strip joints.⁶⁸ Therefore, increasing educational programming on a per day basis will provide children with quality alternatives to adult programming such as sex and violence. While parents and caregivers can turnoff what is terrible and inappropriate on television, they cannot turn on what is missing. Since the marketplace has not responded with more educational programming , only the FCC can remedy this problem.

Increasing educational programming is especially important to children from lower income homes. Studies show that lower income⁶⁹ and minority⁷⁰ children watch more commercial television then other children. Many of these children depend on

⁶⁸ Minow & Lamay at 37-39. Other shows included Geraldo: Child-killing cults and Inside Edition: An update on a high school girl who killed her boyfriend but isn't going to jail. See also Chairman Reed Hundt, Speech at the Press Club on July 27, 1995, at 3.

⁶⁹ Wright & Huston at 16. See also Watkins at 355 (lower income children watch twice as much commercial television as upper income children); Diane E. Levin & Nancy Carlsson-Paige, Developmentally Appropriate Television: Putting Children First, Young Children at 38 (July 1994) (finding children in low income homes watch 50% more television).

⁷⁰ The Black Child Advocate, Vol. 22, No.3, at 21 (fall 1995) citing, National Assessment of Educational Progress 1992 Trend Assessment; and unpublished Trend Almanacs, 1978- 1990. Black children watch more television than white or hispanic children. In a 1990 sample of children age nine, 47% black children watched six plus hours of television per day compared to 18% white and 26% hispanic. Id. Similarly, 35% of thirteen year old black children watched six plus hours of television per day, while only 12% of white children and 18% of hispanic watched the same amount or more. Id.

television as their pre-school and after-school babysitters.

"Latch key" children depend on television in much the same way.

For these children, the availability of new technologies and information services (such as cable, direct broadcast satellite, video dialtone, and computers) does not eradicate the need for educational programming on commercial broadcasting.⁷¹ Due to prohibitive costs, lower income children are less likely to have access to the alternative educational programming offered on cable.⁷² Because some positive children's offerings are only available on cable, it is critical to ensure that free educational programming is available to poor children.⁷³ In addition, reliance on videocassette recorders requires expenses that may be beyond the means of low income families.⁷⁴ Commercial broadcast signals remain the most important means through which American children receive their programming. Ensuring there remains free educational programming for children,

⁷¹ cf. Quello cited in the Washington Post on Oct. 13, 1995 stating there has been an "explosion of choice" in children's programming due to cable television channels and satellite broadcasters. Paul Farhi, Longest-Running Show On TV: Station Licenses: Starting with Kids' Programs, Wash. Post, Oct. 13, 1995, at A-1.

⁷² Only about 62% of all television households currently passed by cable actually subscribe. 1994 Cable Competition Report, 9 FCC Rcd at 7492. See also Watkins at 355, 367 (finding that for lower-income households, the majority of youth viewing is commercial broadcast fare, while for other households cable accounts for increasing percentages).

⁷³ Watkins at 379.

⁷⁴ Id.

especially those at risk, is therefore, extremely important.

B. Because Children Watch an Average of Twenty-eight (28) Hours of Television Per Week, the Standard Should Be Set at One Hour Per Day

The Notice suggests setting the programming standard at three hours per week of core programming with possible increases over time.⁷⁵ Commenters believe that the programming standard should be set at one hour per day beginning next season. Given that children watch an average of 28 hours of television each week,⁷⁶ it is not unreasonable to require broadcasters to air one hour of children's educational programming per day. An hour per day would ensure that children of all ages and interests have available to them a reasonable opportunity to view diverse, engaging and age-appropriate educational programming.⁷⁷ Moreover, one hour per day amounts to only 4 percent, a minuscule proportion, of a licensee's total programming.

Expressing the programming standard in hours per day will ensure that core programming is not aired exclusively on Saturday

⁷⁵ Notice at 30-31.

⁷⁶ Diane Levin and Nancy Carlsson-Paige, Developmentally Appropriate Television: Putting Children First, Young Children, July 1994 at 38. See also Watkins and Pediatrics: American Academy of Pediatrics, Children, Adolescents, and Television, Vol. 96, No. 4 at 786 (Oct. 1995) (most children in the United States spent more time watching television than performing any other activity except sleeping).

⁷⁷ Adoption of a programming standard would not create a ceiling on the amount of programming aired. Rather because educational programs now aired on most stations is so low, a programming standard would represent an improvement in actual hours broadcast-- at least several stories up from the current "floor."

mornings.⁷⁸ Commenters disagree with the Commission's proposal that the requirement should be averaged over a specific period of time.⁷⁹ To do so would enable broadcasters to air most of their core programming in a short period of time, as opposed to throughout the year. For example, broadcasters might air all of their children's educational programming during the summer months and then air none during the lucrative fourth quarter when broadcasters can make more money airing programming promoting toys.⁸⁰

However, if the programming standard is set at three hours per week, then it should increase over time so as to avoid giving stations currently airing more than three hours a week an incentive to cut back. The ultimate level of the standard should be seven hours per week, rather than five. This could be

⁷⁸ See Press Kits released by CBS, ABC, FOX and CBS announcing their children's educational programming for Fall 1995. The Network line-up of children's educational programming all falls on Saturday, with the exception of one show scheduled for weekdays by Fox. See Press Fall 1995 Kits. Due to economic realities, stations owned by or affiliated with major networks will not air standard weekday fare for children. Watkins at 364. Moreover, childrens shows aired on Saturdays are more likely to be pre-empted by sports and other programming. Aufderheide & Montgomery at 16.

See also Kunkel & Goette at 6 (finding 65% of stations programming specifically designed to educate and inform children in 1994 was aired on weekends only) and NAB 1994 Children's Television Survey (finding that in the Fall of 1993, 64.5% of all educational and informational programming was aired on the weekends).

⁷⁹ Notice at ¶62.

⁸⁰ However, if the Commission decides to average programming, the smallest span of time of which should be adopted is one week in order to prevent the problems previously described.

achieved by increasing the standard by one half an hour per year until the it reaches seven hours per week.

In addition, stations, regardless of location or market size, should be held to the same programming standard.⁸¹ Due to the importance of educational television in rural areas, Commenters believe it would be a disservice to establish a lower requirement in small markets.

C. Qualifying "Core" Programs Should Be Specifically Designed To Educate and Inform Children

Commenters strongly support the Commission's proposal to replace the current broad definition of "educational and informational" programming with a more particularized definition of "core programming." Commenters support the Commission's proposed six part definition of "core programming"⁸² except to the extent that it would count programming aired before 7:00 a.m. and programming of less than 30 minutes in length.

Clearly, core programming must be "specifically designed to meet the educational and informational needs of children aged 16 and under," as that is what the CTA requires. Commenters further agree with the Notice that education must be a significant purpose of the program, although it need not be the only purpose; and certainly, programming that is entertaining will qualify so long as a significant purpose of it is to educate or inform.

The Commission must make clear that the definition of "core

⁸¹ Where compliance with the standard would not be economically feasible, a station could seek a waiver.

⁸² Notice at ¶ 26.

programming" adopted in this proceeding supersedes the existing definition of educational and informational programming as "programming that furthers the positive development of children 16 and under, . . . including the child's intellectual/cognitive or social/emotional needs in any respect" (emphasis added).

The Commission should also clarify that just because a program contains a pro-social theme or does not contain violence,⁸³ does not make it an "educational or informational" program. Despite the Commission's prior recognition that programs such as "The Flintstones" and "The Jetsons" are not specifically designed to educate and inform children, and apparent agreement in the industry that airing such shows does not fulfill broadcasters' obligation to air programs that educate and inform children,⁸⁴ broadcasters continue to claim such programs in their quarterly reports.⁸⁵

Commenters agree with the Commission that it should require broadcasters to specify in their children's programming report

⁸³ This mere lack-of-violence criterion seems to be the genesis of the term "FCC Friendly," a term with no legislative or regulatory significance.

⁸⁴ See, e.g., Reply Comments of the Walt Disney Company in the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 93-48, at ii (June 7, 1993) ("All Commenters in this proceeding agree that the Commission's goal is to ensure that broadcasters fulfill their obligation to air programs that educate and inform children. Commenters also agree that programs like *The Flintstones*, do not satisfy that obligation.")

⁸⁵ See Kunkel & Goette study, Table 2 (programs listed included "Batman," "Biker Mice from Mars," "Eek! The Cat," "Garfield," "Tom and Jerry Kids" and "X-Men.")

the educational objective or skill to be taught by each program, e.g., to teach a subject such as: history or science, to enact a piece of literature, or develop a skill such as mathematics or vocabulary.⁸⁶ This will permit parents, researchers and educators to evaluate whether the program achieves its stated goals.

In addition, stations should indicate the specific age group that each program is designed to serve to allow parents to assess whether each group was adequately served.⁸⁷ Such targeting will enable broadcasters to identify gaps in service to groups of children so that they may fill such a void.

D. Credit Should Not Be Given for Programming Aired Before 7:00 a.m.

Commenters agree with the Notice's premise that "credit at license renewal time should be given only for programming shown during hours when children are likely to watch television."⁸⁸ However, we disagree with the proposal to credit programming

⁸⁶ See Kunkel and Goette at 8 (finding one station claimed 37 programs as specifically designed to educate children without offering any descriptive information regarding the shows educational value).

⁸⁷ Commenters oppose adopting a rating point system, as proposed in ¶ 64, because studies demonstrate that programming that is specifically targeted to the skills and comprehension of a particular age group best serves the educational programming needs of those children. However, programming that is narrowly tailored to meet the needs of a specific age group will likely not garner a large audience and sizable ratings. Therefore, adoption of a rating point system would undermine the provision of programming specifically designed to educate and inform children.

⁸⁸ Notice at ¶ 40.

aired between 6:00 and 7:00 am. CME has already shown that many licensees routinely relegate children's educational programming to the pre-dawn hours.⁸⁹ More recent evidence confirms the severity of this problem.⁹⁰

For example, Nielsen Media Research shows that during the weeks of July 31st, August 7th, 14th and 21st, the average child audience ages two to eleven from 6:00 a.m. to 6:30 a.m. was only 2.4%. However, by 7:30 a.m., that audience more than doubled to 10.1%.⁹¹ Similarly, on Saturday mornings, only 2% of kids ages 6-11 are watching television at 6:00 a.m., while 25% of kids watch television at 10:00 a.m.. And on Sunday mornings, only 1-2% of all the kids watch television at 6:00 a.m.. This, however, increases to approximately 15% by 10 or 11:00 a.m.. Clearly, broadcasters should not receive credit for programming that is not received by its intended audience as that undermines the intent of the CTA.

E. Core Programming Should Be Regularly Scheduled and Standard Length So Parents and Children Can Easily Ascertain When It is On and Watch It

Commenters agree with the Notice that core programs should

⁸⁹ Aufderheide & Montgomery found that stations were running shows before children were even up. They also found that in the top 20 television markets, 44% of all educational programming aired at 6:30 a.m. or earlier; of those 25% were on either at 5:00 or 5:30 a.m.. Id. at 15.

⁹⁰ See Disney supra Section IB and accompanying text.

⁹¹ At 8:00 a.m. the audience was at 13.7%; 8:30 a.m. at 16.4%; 9:00 a.m. at 18.7% and at 9:30 a.m. at 19.2%.

include only those programs that are regularly scheduled.⁹²

While specials designed to educate children are surely worthwhile, there are good reasons that they not be counted toward the core programming standards. Predictability and regularity are important both to the success of children's educational television and to parental control over what children watch. Unless a program is regularly scheduled, its potential audience may have difficulty finding it and viewer loyalty and its commercial success will be affected accordingly.

Commenters strongly disagree, however, with the Commission's suggestion that programs fifteen minutes in length might constitute core programming.⁹³ Commenters presently know of no fifteen minute programs listed in the programming guides. Moreover, parents and children do not expect programs to air for only fifteen minutes. Fifteen minute "programs" are rarely found on commercial television, due to rigid scheduling and ratings requirements.⁹⁴

⁹² Notice at ¶ 41. Two different studies show that the total amount of time devoted to children's educational specials has been negligible. Compare, Kunkel Study at 4, Table 7 (1993) (finds an average of 12 "specifically designed" minutes per week) with NAB Study at 3, Figure 3 (1994) (finding a national average of 11.9 minutes of educational programming per week).

⁹³ Notice at ¶ 36.

⁹⁴ Cf. Request for Declaratory Ruling of National Association of Broadcasters Regarding Section 312(a)(7) of the Communications Act, 9 FCC Rcd 5778 (1994). Seeking a ruling that stations need not provide candidates with other than increments of time because (1) stations could face severe technological burdens because of difficulty of delaying programming to accommodate political advertisements of non-standard length; and (2) because of contractual obligations with both syndicators and

The Commission also inquires as to whether short-segments, i.e., PSAs or interstitial, should count towards core programming, and if so, to what extent they should be credited towards fulfilling the core requirements.⁹⁵ Commenters believe that they should not be counted toward a licensee's obligation to provide "core" programming. Research indicates that short segment programming "diminishes learning opportunities and outcomes for children" as compared to half hour or longer programs.⁹⁶ In addition, experts have found that children learn best when they can focus on a concept for an extended period and when a single idea is presented and reinforced repeatedly, provided, of course, the concept is presented at an appropriate developmental level. Finally, short segment programming is not really "programming"-- it is PSA's and interstitials which are often buried within other programming..⁹⁷ It is therefore marginal and does not result in increased production of programming for children.

Finally, Commenters endorse the Commission's proposal to

networks, a station may not have five-minute, or other odd length periods of time to offer a client. Id. at ¶ 4. Odd-length programming would "fractionalize the station's programming and cause confusion among viewers. Id. at fn.5.

⁹⁵ Notice at ¶ 42.

⁹⁶ See Comments of APA at 2-3 (May 7, 1993).

⁹⁷ Aufderheide & Montgomery at 12 found that some producers argued "prosocial" moments or behaviors made a show educational. Ruby-Spear's President Joe Ruby said he "put a lot of educational bites" into popular shows because he is in the business of entertainment and not a school teacher. Id.

count as "core programs" only those programs identified as educational children's programming at the time the program is aired.⁹⁸ To undertake monitoring, the public must know when shows are going to air and also have access to information regarding shows that have aired. Therefore, broadcasters should be required to identify their qualifying "core" programs in advance and publish such information in local TV Guides. Use of an icon would also enable parents to plan and supervise their children's educational viewing.

III. REQUIRING STATIONS TO AIR AN HOUR OF CORE PROGRAMMING A DAY IS CONSTITUTIONAL AND CONSISTENT WITH THE CTA

Because reliance on the voluntary efforts of broadcasters has failed to significantly increase the amount of educational and informational programming aired for children, requiring stations to provide an hour a day of core programming is both constitutional and consistent with the CTA.

A. Adoption of a Programming Standard is Constitutional

In ¶ 67 of the Notice, the Commission concludes that the government has a substantial interest in furthering the education and welfare of children through the implementation of the CTA. Commissioner Chong, in her separate statement, asserts: "I cannot think of a more compelling government interest than that of

⁹⁸ In addition to publishing notice of programs in television guides and using icons, the Commission should encourage broadcasters to undertake other efforts to advertise their "core" children's television programs. Programs could be advertised on television, in magazines geared toward children and parents, in materials such as weekly readers distributed to children, and using other types of programming promotionals.

protecting and nurturing our most precious resource--our children."⁹⁹ In adopting the CTA, the legislative history states that not only is this interest substantial, but it is indeed, "difficult to imagine a more compelling governmental interest than promoting the welfare of children who watch so much television and rely upon it for much of the information they receive."¹⁰⁰ And recent studies, discussed supra, lend additional support for the conclusion that a programming standard would promote children's education and welfare.¹⁰¹

The Notice then suggests that in determining the constitutionality of a programming standard,¹⁰² a reviewing court would utilize intermediate scrutiny as contemplated by O'Brien/Ward/Turner.¹⁰³ Commenters believe that intermediate scrutiny is not the appropriate standard of review. Where

⁹⁹ Separate statement of Commissioner Rachelle B. Chong to the NPRM, 10 FCC Rcd 6371 (1995).

¹⁰⁰ H. Rep. No. 101-385, 101st Cong., 1st Sess. (1990); S. Rep. No. 101-227, 101st Cong., 1st Sess. (1990).

¹⁰¹ See discussion supra at Section II A.

¹⁰² We note that the constitutionality of the CTA itself is not properly before the Commission. Significantly, no broadcaster has ever sought review of the constitutionality of the CTA. Indeed, the broadcasters rely heavily on the existence of the CTA in arguing against spectrum auctions or spectrum usage fees. See NAB's Spectrum Flexibility Press Release dated March 29, 1995 summarizing broadcasters' public interest obligations. The Commission cannot declare any part of the Communications Act unconstitutional. See Johnson v. Robison, 415 U.S. 361, 268 (1974); Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987). Only the Courts can do that, and really in this case, only the Supreme Court.

¹⁰³ Notice at ¶68.

affirmative obligations are imposed on licensees, Courts will apply "the more relaxed standard of scrutiny adopted in Red Lion."¹⁰⁴ Under Red Lion, Congress can clearly require that broadcasters, as public fiduciaries, render public service to children.¹⁰⁵ The Court in Red Lion made clear that "nothing in the First Amendment . . . prevents the Government from requiring a licensee to conduct himself as a proxy or fiduciary" . . . "for the entire community, obligated to give suitable time and attention to matters of great public concern." Here a programming standard furthers the First Amendment interests of children without infringing on those of the broadcasters.

Nonetheless, the programming standard would withstand both strict scrutiny and intermediate scrutiny as contemplated by the FCC.¹⁰⁶ Because a regulation that withstood strict scrutiny

¹⁰⁴ 395 U.S. 367 (1967) (finding the public's interest is "paramount" over the broadcasters' First Amendment interest). See also Turner, 114 S.Ct. 2445, 2457 (1994) (finding that broadcastings' unique scarcity concerns required "application of the more relaxed standard of scrutiny adopted in Red Lion"); CBS v. FCC, 453 U.S. 367 (1981) (recognizing the "delicate balancing of competing interests," the Court concluded that "statutory right of access . . . properly balances the First Amendment rights of federal candidates, the public and broadcasters" and did not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming); Mt. Mansfield Television, Inc., 442 F.2d at 476 (in finding PTARS constitutional the court reiterated that because of the "peculiar characteristics" of broadcasting the "public's right to access must prevail over all other claims"); Branch v. FCC, 824 F.2d 37 (D.C. Cir. 1987) (finding the equal opportunities rule in Section 315 of the Communications Act of 1934 constitutional applying the balancing test established in Red Lion).

¹⁰⁵ 395 U.S. at 389-394.

¹⁰⁶ Notice at ¶ 68-69.

would clearly withstand review under both intermediate scrutiny and rational basis, the strict scrutiny analysis follows.

Adoption of a programming standard is narrowly tailored to achieve the compelling purpose of advancing children's education and welfare because, as discussed supra, the Commission's long history of relying on self regulation to increase educational television programming for children has failed.¹⁰⁷ An hour a day is a minuscule proportion of the total broadcast day. Moreover, a program standard still reserves a great deal of editorial discretion to broadcasters. Broadcasters retain free editorial control over the content of each core program (including the subject taught and format), the duration, scheduling and audience.

Commenters agree that the adoption of a programming standard under the CTA is less intrusive than the prohibition on editorializing struck by the Supreme Court in FCC v. League of Women Voters.¹⁰⁸ Suppressing a specific form of protected speech in direct violation of the First Amendment is a far cry from adopting a standard where broadcasters retain editorial discretion to select the program, the audience, and the other

¹⁰⁷ Even the FCC's attempts at providing broadcasters with incentives to air educational programming, such as the children's exception to the prime time access rule, have similarly failed to stimulate broadcasters to provide educational programming for children. NAITP v. FCC, 516 F.2d 526 (2nd Cir. 1975).

¹⁰⁸ Notice at ¶ 70.

programming aired during other hours.¹⁰⁹ Similarly, adoption of a programming standard is also less restrictive than channeling upheld in Action for Children's Television v. FCC.¹¹⁰ If prohibiting broadcasters from airing indecent programming from 6 a.m. to 11 p.m. is found to be sufficiently tailored, then requiring some educational programming in the hours when children are in the audience is also sufficiently tailored. Therefore, adoption of a programming standard is narrowly tailored to serve a compelling interest and, because the programming standard would survive strict scrutiny, it would also survive intermediate scrutiny and rational basis.

B. Adoption of a Programming Standard is Consistent with the CTA

In addition, nothing in the CTA or legislative history prevents the FCC from utilizing a programming standard in reviewing license renewals.¹¹¹ The Children's Television Act is silent concerning the FCC's promulgation of a programming

¹⁰⁹ See also NAITPD v. FCC, 516 F.2d 526, 531 (2nd Cir. 1975) found the PTARS constitutional because when viewed in the context of the broadcaster's public interest obligations, PTARS "appear[ed] to be a reasonable step toward fulfillment of its fundamental precepts." Certainly PTARS which prohibit a certain type of programming during very specific hours of the day are more restrictive than guidelines that promote broadly defined programming with tremendous discretion as to when it airs.

¹¹⁰ 58 F.3d 654 (D.C. Cir. 1995), petition for cert. pending, filed Sept. 26, 1995.

¹¹¹ Cf. Statement of Commission Barrett, NPRM, MM Docket No. 93-48, 10 FCC Rcd 6308, 6363 (1995).

standard.¹¹² The CTA's silence indicates that Congress did not intend to prevent the FCC from adopting a standard to be used in evaluating the "extent to which the licensee has complied with such standards."¹¹³

The CTA's legislative history also supports this interpretation. The House Report stated "[t]he Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must air to have its license renewed pursuant to this section or any section of this legislation."¹¹⁴

Although the legislative history indicates that the House and Senate committees did not want to require or mandate the use of a standard, the language makes clear that Congress did not intend to prohibit the use of a standard either. Rather, the CTA and the legislative history demonstrate Congress entrusted the FCC with the discretion to administer the CTA's requirements based upon its expertise and experience. The FCC could adopt a programming standard if it found it served the public interest;

¹¹² Chevron, 467 U.S. 837, 843-4 (1984) (finding if Congressional intent is ambiguous or silent, an agency's interpretation will be upheld so long as it is a "permissible construction" of the statute).

¹¹³ 47 U.S.C. 303(b)(a)(1).

¹¹⁴ H.R. Rep. No. 385, 101st Cong., 1st Sess. 17 (1989) (emphasis added). See also S. Rep. No. 227, 101st Cong., 1st Sess. 23 (1989) (the relevant language in the Senate and House Reports is identical except that the Senate report excises the phrase "or mandating" following the word "requiring").

it simply was not ordered to do so by Congress.

Even if the CTA's legislative history was found to be ambiguous,¹¹⁵ the FCC's use of a programming standard would be upheld by a reviewing court as a permissible construction of the CTA.¹¹⁶ The legislative history of the CTA shows that legislators were concerned about both the creative freedom of broadcasters, and the quantity and quality of children's educational programming.¹¹⁷ Adoption of a standard which provides increased programming for children and editorial freedom, plus certainty, for broadcasters is an eminently reasonable way of balancing these interests.

While interpreting the Children's Television Act to permit adopting a programming standard may represent a change in FCC policy,¹¹⁸ the FCC clearly has the authority to change its

¹¹⁵ Ambiguity occurs where there is a range of imaginable interpretations and a statute does not clearly preclude an agency's approach. Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 962-63 (D.C. Cir. 1990).

¹¹⁶ The resolution of ambiguity in a statute "inevitably requires the agency to consider competing policy objectives; it is the reconciliation of such conflicts that is entitled to judicial deference." Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 923 (D.C. Cir. 1991), cert denied, 112 S.Ct. 1584 (1992) (citing Chevron, 467 U.S. at 865).

¹¹⁷ See, H.R. Rep. No. 385; S. Rep. No. 227.

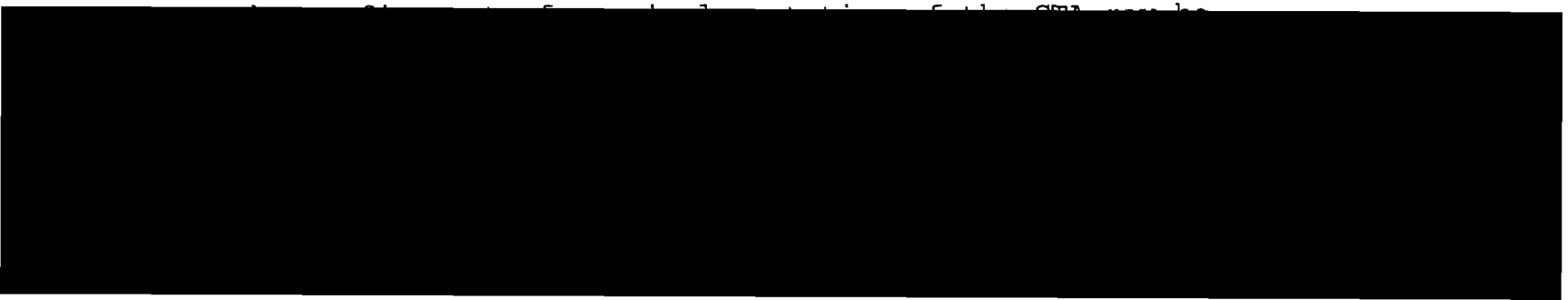
¹¹⁸ See Rust v. Sullivan, 500 U.S. 173, 186 (1991), quoting Chevron, 467 U.S. 862-64 (finding "'[a]n initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis' and [therefore an agency 'must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances'"). See also Ricardo Davila-Bardales v. IMS, 27

policy so long as its change is the result of "reasoned analysis."¹¹⁹ As discussed supra, reliance on the voluntary efforts of broadcasters has failed to implement the statute. As early as 1974, the Commission forewarned that if voluntary compliance by the broadcasters failed, the "question of rules [would] be revisited."¹²⁰ Therefore, it is now necessary to give broadcasters clear and operational guidance of what is required of them under the CTA. Objective notice of what basis broadcasters' licenses will be reviewed upon will better fulfill

F.3d 1, 5 (1st Cir. 1994) (finding "[e]xperience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in light of new insights and changed circumstances"); Community First Bank v. The National Credit Union Administration, 41 F.3d 1050, 1055 (6th Cir. 1994) (finding an agency may change its policy several times as a result of changes in circumstances).

¹¹⁹ Rust v. Sullivan, 500 U.S. 173, 185 (1991), citing Motor Vehicle Mfrs. Assn of U.S v. State Farm Mutual Automobile Insns. Co., 463 U.S. 29, 42 (1983) (finding an agency's departure from a prior policy interpretation reasonable where the prior policy failed to implement the statute; give clear and operational guidance to those persons regulated; a new policy better fulfilled the original intent of the statute and was justified by prior experience); See also Mantex, Inc. v. U.S., 841 F. Supp. 1290, 1303 (Ct. Intl. Trade Dec. 22, 1993) (found analysis was reasoned where agency had previously announced intent to review policy and deliberated over its policy for considerable time before reversing it).

¹²⁰ Matter of Petition of Act for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Report and Policy Statement, Docket No. 19142, Oct. 31, 1974. See also NOI, 8 FCC Rcd 1841 (Mar. 2, 1993) at ¶ 5 (FCC found that "[i]n light of our experience in reviewing renewal applications that are subject to the CTA's programming requirements and in evaluating the efforts licensees have documented to meet those requirements, we believe



the statute's goals of increasing educational programming. Thus, interpreting the CTA to permit the adoption of a programming standard is constitutional and consistent with the CTA.

IV. THE FCC SHOULD IMPROVE ITS MONITORING AND ENFORCEMENT OF THE CTA

While Commenters strongly urge the FCC to adopt a programming standard, no matter what action the FCC decides to take in this proceeding, it should improve its monitoring and enforcement of the CTA. However, effective monitoring may not be undertaken until the FCC adopts a standardized children's programming report. Currently, FCC rules require all stations to report¹²¹ their specifically designed educational programming. However, because there is no standard report, variation in reporting formats and practices has led to inconclusive and unreliable statistics concerning the amount of educational programming currently aired and the non-broadcast efforts undertaken by broadcasters to meet the CTA.¹²² In addition, The FCC should penalize broadcasters who fail to comply with the

¹²¹ Commenters strongly oppose the Commission's suggestion at ¶ 75 that licensees should be permitted to certify they have aired the prescribed amount of core programming (or sponsoring programming). This suggestion is clearly unlawful and should be rejected out of hand. The legislative history of the CTA unequivocally requires the submission of records. The House report on the Act states: "broadcasters must ... send their children's lists contained in the public files to the FCC at the time the Commission is considering their license for renewal.... That is the Committee's explicit intent." H. Rep. No. 365, 101st Cong., 1st Sess., at 18 (1989); See also S. Rep. No. 227, 101st Cong., 1st Sess., at 23 (1989).

¹²² Notice at 17-18.

FCC's rules reporting requirements.

Moreover, the FCC should also educate the public about what the CTA and its rules require. In addition, the FCC should inform the public what enforcement actions they may take where a broadcaster fails to comply with the CTA and its rules. The FCC should also clarify its own enforcement mechanisms at license renewal, as well as during the license term.

A. The FCC Should Adopt a Standard Children's Programming Report and Penalize Licensees Who Fail to Comply With Reporting Requirements

Many stations have failed to comply with the Commission's reporting requirements. Dr. Kunkel found in his 1992 Study, that more than a quarter of all stations failed to identify any educational programming specifically designed for children.¹²³ His most recent study found that one in ten stations failed to claim any specifically designed educational programming.¹²⁴ Even this latest figure represents a serious degree of non-compliance with the CTA's requirement that each station air "some" educational programming.

In addition, although the FCC's rules require broadcasters to report "at a minimum, the time, date, duration and brief description of the program or non-broadcast effort the licensee has made to serve the educational and informational needs of children,"¹²⁵ the Kunkel study found that in 1992, 29% of all

¹²³ Kunkel & Goette at 6.

¹²⁴ Id.

¹²⁵ 47 C.F.R. § 73.3526(8)(iii).

stations failed to fully report the information requested by the FCC.¹²⁶ Kunkel's more recent report found that the percentage of stations who file incomplete and unreliable reports is up to 40%.¹²⁷

Without complete, accurate and comparable information, neither the FCC, broadcasters and or the public can determine how much educational programming is airing.¹²⁸ Nor will they be able to monitor the efficacy of the rules adopted in this proceeding.¹²⁹ Thus, the FCC should adopt a standard children's programming report for use by all stations. The form should require broadcasters to identify their core programming or explain how they otherwise made a compelling showing under the CTA.

¹²⁶ Kunkel & Goette at 7.

¹²⁷ Id.

¹²⁸ Adoption of a standard form that will require broadcasters to explicitly identify which programming fulfilled what requirements will alert licensees to the fact that the amount of educational and informational programming presented on the air is what determines renewal, not the thickness of the renewal application package.

¹²⁹ The Commission should use these programming reports to determine whether the overall provision of core programming has increased for all stations. The Commission has implemented similar procedures that assess the efficacy of its Equal Employment Opportunity rules and the Commission could easily undertake the same kind of statistical review here. Such data collection would provide the Commission with a means to determine trends and promulgate rules that most effectively fulfill the purpose of the Act.

Specifically, we suggest that a quarterly¹³⁰ Children

Television Report should collect the following information:

1. For each week in the quarter, state the total number of hours of core programming aired. For each core program aired:
 - a. state the name of the program;
 - b. state the day of the week, date and time it aired;¹³¹
 - c. state the length of the program;
 - d. state whether the program was produced by the station, obtained from a network or from syndication;
 - e. identify the age group the program was designed for;
 - f. describe the educational objective or skill it taught;
 - g. describe how the program met the objective in (f);
 - h. identify whether and how the program was publicized prior to airing; and
 - i. state how the program was identified as educational at the time it was aired.
2. If your station did not meet the standard for core programming for more than one week in any given quarter, please explain how the qualifying programming you aired plus other programming-related activities served the educational and informational needs of children in that market as well as or better than an additional amount of programming specifically designed to serve the educational and informational needs of children.

Furthermore, the FCC should penalize stations who fail to comply with these reporting requirements.¹³² The FCC should not tolerate such blatant disdain for its rules. Failure to comply

¹³⁰ Rule 47 CFR § 73.3526(a)(8)(iii) should be amended to provide for quarterly collection of this information by stations and annual filing with the FCC.

¹³¹ If any show was pre-empted by other programming, the broadcaster should note the day, date and time of the pre-emption.

¹³² Notice at ¶ 20, fn. 38.